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International Judicial Assistance — Italy

International judicial assistance will be considered in this discussion from the point of view of the assistance, either active or passive, which the Italian government gives to the service of process in a foreign lawsuit and in the taking of evidence in Italy to be used in a lawsuit pending in a foreign court. Active assistance is given when the Italian government through its judicial branch permits a foreign legal document to be served by its court marshal or when a rogatory is obtained before one of its judges. In connection with passive assistance, no Italian government officials are involved but the Italian law permits a foreign official or individual to perform an act on Italian territory which has legal effect outside of Italy.

At the present time there are no multilateral conventions, to which both Italy and the United States are party,[1] nor any bilateral conventions between the two countries, which cover the subject matter of this article. While some commentators argue that the Most Favored Nation clause contained in Article 5(4) of the Treaty of Friendship, Commerce and Navigation between the United States of America and Italy gives Americans the benefit of the entire network of bilateral conventions to which Italy is a party (mainly with Civil Law Coun-

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[1]The United States is a party to the convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, 20 U.S.T. 361; T.I.A.S. 6638; 658 U.N.T.S. 163, and the convention on the taking of evidence abroad in civil or commercial matters, T.I.A.S. 7444. Unfortunately Italy has not as yet adhered to either of the conventions and action in connection with their approval does not seem imminent.

tries),[2] we do not believe that Italian courts would extend the treaty provisions so far.[3]

In order to determine, therefore, what assistance Italy gives to parties to a lawsuit pending in the United States when it comes to service of process or gathering of evidence in Italy, we must consider the provisions which are found in the Italian Code of Civil Procedure.

Service of Process

The active assistance which the Italian Government lends a foreign party in serving a defendant residing in Italy is regulated by Article 805 of the Italian Code of Civil Procedure (hereinafter "C.C.P."). The assistance is granted without any need for reciprocity.[4] Article 805 provides that service of a foreign summons in Italy must be authorized by the "Pubblico Ministero" (hereinafter "P.M."), who is a member of the judiciary vested with prosecuting as well as other judicial functions, of the court in whose jurisdiction the service is expected to take place.

If a private individual requests service, he must submit an application to the P.M. who, after examination, will normally grant authorization unless he finds that the service of the summons would violate Italian public policy. Once authorization is granted, the service will be effected by the "ufficiale giudiziario" (hereinafter "U.G.") who is the marshal of the court acting as process server.[5] The U.G. can effect service as follows: (a) personal service within the jurisdiction of the court where the U.G. acts (Article 138 C.C.P.); (b) service at the residence, domicile or office of the person to be served (Article 139 (C.C.P.). If the person is not found on the premises service is considered effected by delivery of the summons to a member of his family or an employee in his office; (c) if none of the above persons is found on the premises, the summons may be served on the concierge or a neighbor, followed by the mailing of the summons by registered mail to the person to be served (Article 139 C.C.P.); (d) if none of the persons mentioned above are found or if they refuse

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[2]Capelletti and Perillo in "Civil Procedure in Italy," Hague 1965, declare at § 15.02 that Article 5(4) as interpreted by the Supreme Court of Cassation in Durst Manufacturing Company against Banca Commerciale Italiana, July 3, 1960, No. 2228 Giustizia Civile (part I) 1541 (1960), ". . . U.S. nationals may benefit from the entire network of conventions on international procedure to which Italy is a party."

[3]Article 5(4) refers to the right "to enjoy freedom of access to the courts of justice and to administrative tribunals and agencies." We interpret this to mean simply that U.S. citizens may take advantage of the most favored nation clause only in the determination of their rights as parties in lawsuits in Italy. Service of foreign process or the gathering of evidence to be used before a foreign court is not participation in a lawsuit pending before an Italian Court.

[4]*See* F. POCAR, L'ASSISTENZA GIUDIZIARIA INTERNAZIONALE IN MATERIA CIVILE, Padova, 1967, p. 223.

[5]*See* Article 137 C.C.P.

to accept the summons it is posted at the town hall of the place where service is to be made, followed by mailing to the person to be served by registered letter (Article 140 C.C.P.); (e) service at the address which the person has elected as his domicile (Article 141 C.C.P.).

In some states of the United States, the law accepts only personal service and it then becomes important to make sure that the U.G. uses only that method of service to the exclusion of all others to assure that the service, although proper under Italian law, not be ineffective in the jurisdiction where the action is brought.

If service is effected in Italy without the authorization of the P.M. as required by Article 805 C.C.P. then service would be improper under Italian law. The question arises if, in such a case, the Italian courts would give recognition to a foreign judgment based on a service improperly made in Italy. Article 797 C.C.P. specifies under what conditions the court may give recognition to a foreign judgment in Italy; and paragraph (2) thereof provides, in particular, that the summons must have been "served in the manner provided by the law of the place where the case was tried, and that adequate time was granted to permit the summoned party to place an appearance." In determining the validity of the service, therefore, reference is made to the law of the original forum. Even if service were made in Italy in a manner contrary to Italian law the question of service would still be determined under the principle of law applicable where the case was tried.[6]

If the law of the forum requires that service abroad be effected following the law of the state where the defendant must be served, Article 805 becomes a determining factor because a service performed without obtaining the authorization of the P.M. would be invalid. Even though no objection was raised in the original action, it could be raised in Italy in the course of the proceeding for the recognition of the foreign judgment.[7]

Section 313 of the New York C.P.L.R., taking a specific example from one of the United States of America, does not require that service be effected in a foreign country according to the local rules of procedure. A New York summons, therefore, can be properly served in Italy by an attorney duly qualified to practice there. The service, although improper under Italian law would still be effective when considered in a proceeding for the recognition of the judgment obtained thereon in a New York Court. However, effecting improper service of process in Italy may be considered a violation of Italian law

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[6]*See* Scheggi v. Compagnia Assicurazioni Zurigo, Court of Cassation, Decision 855 of April 19, 1961, XI GIUSTIZIA CIVILE, I, 1212; G. MORELLI, DIRITTO PROCESSUALE CIVILE INTERNAZIONALE, 1954, p.

[7]*See* G. MORELLI, DIRITTO PROCESSUALE CIVILE INTERNAZIONALE, 1954, p. 327.

and may result in a prosecution of the process server, whether he is an Italian or a foreign citizen, for having usurped a function which the Italian law has reserved to a public official (the marshall of the competent court) duly authorized by the P.M. A marshall who serves a legal document without the authorization of the P.M. in accordance with Article 805 would be subject to disciplinary action and fines.

This is the reason why Italian attorneys are usually reluctant to, themselves, effect service on request of their American colleagues and prefer to follow the procedure of Article 805. We are not aware of any case in which anyone has been prosecuted in Italy for having served a foreign legal document without following the procedure of Article 805 C.C.P., and the probabilities that the question will be raised are not great. However, the possibility remains that a rather combative defendant improperly served will report the matter to the Prosecuting Attorney.

In serving a foreign summons through the U.G. the problem is presented of obtaining an affidavit of service duly sworn as required by most American state laws.[8] The U.G. refuses to issue a sworn statement of the affidavit type, whether in the Italian or a foreign language. According to Italian law, proof of the fact that a summons was served is shown by a special unsworn certificate which bears the mere signature of the process server. The statement appearing over his signature is considered a true statement of fact unless proved to be false through a special legal proceeding.[9] The practical way to resolve this problem is to have someone, such as an Italian attorney, accompany the U.G. and have him thereafter make an appropriate affidavit before a United States consular officer.

Rather than have a private individual request the P.M. for the authorization to serve, it is also possible to have the request presented through diplomatic channels. This is specifically provided for by the second paragraph of Article 805 which states that "Service requested through diplomatic channels is effected, under the supervision of the P.M., by an U.G. requested by him."

If diplomatic channels are used, the request will come from the United States Department of State and will be made to the Italian Ministry of Foreign Affairs which will pass it on to the Ministry of Justice which, having determined the court within the jurisdiction of which service must be effected, will transmit the papers to the competent P.M. There is some dispute as to whether the P.M. must give his authorization to the service in view of the fact that the second paragraph of Article 805 C.C.P. does not mention authorization. As, however, the summons must pass through the hands of the P.M. who must entrust the

[8] *See* Section 306(d) of New York C.P.L.R.
[9] *See* Cappelletti & Perillo, *supra* at p. 163.

service to an U.G. it is widely accepted by legal authors that the P.M. was implicitly granted an evaluation power similar to that which he has when the request comes from a private party. The request through diplomatic channels is rarely used because of the time element. The red tape necessary for the various passages from ministry and from government to government is time consuming.

Taking of Testimonial Evidence

Evidence in Italy for use in a lawsuit pending in the United States may be obtained either by deposition before an authorized person or by letters rogatory.

Depositions

The only written acknowledgment of the right to take a deposition is contained in the United States - Italy Consular convention of May 8, 1878[10] which is still in force today. Article X permits consular officers to receive the "depositions of captains and crews of the vessels of their nation, of passengers aboard of the same and of any other citizen or subject of their country."

Although not mentioned in law or treaty, the Italian government has never objected to the taking of depositions from persons other than those described in the consular convention, nor has it objected if the testimony is taken before a person other than a United States Consul. The Italian government, however, does not lend the power of its judicial authorities to compel the giving of a deposition or to subject to sanctions anyone who commits perjury during the course of a deposition.

Letters Rogatory

When a witness in Italy is unwilling to give a deposition or there are legal impediments to his doing so, use may be made of Letters Rogatory.

Article 802 C.C.P. provides that requests from foreign judges asking for the examination of witnesses, technical expertises, interrogatories or other evidence are rendered enforceable in Italy by decree of the Court of Appeals of the place where the evidence must be taken after having heard the opinion of the P.M. Unless the P.M. finds that the request violates Italian public policy it will be granted.

The request may be submitted in the form of a commission rogatory through diplomatic channels or it may be submitted by counsel for the litigant. In the latter case local counsel duly authorized by Power of Attorney[11] will file a request to the Court of Appeals of the place where evidence must be obtained,

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[10]Made effective in Italy by Royal Decree No. 4538 of September 27, 1878. U.S. Treaty Series No. 178 (Department of State 1878), 20 Stat. 725(1978).

[11]Article 125 C.C.P.

submitting an authenticated copy of the decision of the foreign court which requests the rogatory with an attached translation into Italian.

If the Court of Appeals decides to honor the request, the request is forwarded to the competent judge.[12] Article 802 does not specify who is meant by the term "competent judge." As Article 203 C.C.P. provides that whenever a Court in a lawsuit decides to obtain evidence on certain facts the task is delegated to the "pretore" (Magistrate of the lowest court) of the place where the evidence must be obtained, by analogy most of the Courts of Appeal forward the letter rogatory for execution by the local "pretore."[13]

The proceeding before the "pretore" must be of the adversary type and Article 803 C.C.P. assures that this be respected by providing for the proper representation of the foreign litigant. Article 803 provides that when the request for the taking of evidence has come through diplomatic channels, and the interested party has not appointed counsel, the various steps to execute the letters rogatory shall be taken by the judge entrusted with the execution of the rogatory and the necessary service shall be effected by the court clerk. Whenever the nature of the evidence requested shall require it, the competent judge may appoint counsel ex officio to represent the interested party.

One particular handicap which American counsel will experience in examining the results of the proceeding before the "pretore" is the lack of a verbatim transcript of the hearing. The "pretore" dictates to a clerk a summary of the proceeding which in practice ends up by being a choice of what he considers material.

In executing the letter rogatory, the judicial authority applies Italian procedural law. No particular guidance is provided by the law as to what the Italian judicial authority should do in case the letter requests the use of procedures for obtaining evidence not provided for by Italian procedural law. After the enactment of the 1865 Code the opinion of Italian legal writers, supported by court decisions, was that compliance with the rules of the foreign tribunal be permitted.[14] This initial approach has lost some of its strength since recent court decisions emphasize the primacy of the law of the place where the testimony is taken. According to this current of thought, the execution of the letter rogatory is subordinated to a finding "that it involves a procedural practice which the Italian law admits and regulates."[15]

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[12]Last paragraph of Article 802 C.C.P.

[13]Pocar, *supra*, at page 235.

[14]*See* G.M. Ubertazzi, *Limiti all 'Esecuzione in Italia di Provvedimenti Stranieri Concernenti Mezzi di Prova,* XI RIVISTA DI DIRITTO INTERNAZIONALE PROVATO E PROCESSUALE, 1973, p. 374 at 376-380.

[15]G. MORELLI, DIRITTO PROCESSUALE CIVILE INTERNAZIONALE, Padova, 1954, p. 255; also, F. POCAR, L'ASSISTENZA GIUDIZIARIA INTERNAZIONALE IN MATERIA CIVILE, Padova, 1967 at page

Any procedural practice which is against Italian public order would clearly be considered as unexecutable by the Court of Appeal to which a letter rogatory is addressed. Although no reference to public order is found in Article 802 and 803 C.C.P., the principle is found in Article 31 of the Preliminary Provisions of law in general which provides that in no case may laws or acts of a foreign country have an effect in Italy if they are against Italian public order. In a case decided in 1968, the Court of Appeals of Cagliari refused to honor a rogatory coming from Germany which requested a blood test in a paternity case. The Court found that the evidence requested by the rogatory was against Italian public order.[16]

Whether the request contained in a letter rogatory that a witness be cross-examined by an attorney representing a party should be considered as in violation of Italian public order, is a question which has not been decided by any published court decision. We believe, however, that any such request would not be honored because it would be contrary to the inquisitorial system typical of the civil law trial which denies counsel an opportunity to examine or cross-examine witnesses. The questioning of witnesses is left to the judge to whom counsel may only suggest questions.[17] In practice, however, the judge will, except in unusual cases, ask all of the questions suggested by counsel.

Another doubt arises as to whether an Italian judge would accept a witness' claim of privilege based on United States law. Following the more formalistic approach described above, the claim would probably be rejected as contrary to Italian procedural law regarding qualification of witnesses.[18]

Obtaining Other Evidence

Pursuant to requests contained in letters rogatory which may be submitted in the manner previously discussed, Italian courts can compel the production of tangible evidence.[19] This right, however, may not be of much practical use since the fine for disobedience is only eight lira. Many public records, however, are available on request, and copies or extracts of these records may be obtained

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232 where he states: "It is also necessary that the requested probatory means be accepted and regulated by Italian law, because, if it were not, its execution would be outside of the judicial powers of the local judge who would find himself confronted with a practical impossibility of execution."

[16]Decision of the Court of Appeals of Cagliari rendered on February 29, 1968, in RIVISTA DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE, 1968, p. 461; F. POCAR, SULLA ESEGUIBITITA IN ITALIA DI ROGATORIA ESTERRA DI PRELIEVO DI SANGUE, GIURISPRUDENZA ITALIANA 1969, I,2,591.

[17]A contrary opinion has been expressed by Ubertazzi, *Limiti all 'Esecuzione in Italia di Provvedimenti Stranieri Concernenti Mezzi di Prova,* RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE, 1973, p. 374, f. 43, p. 394.

[18]Cappelletti and Perrillo, *supra,* at page 404.

[19]C.C.P. 802.

without the necessity of court intervention. Among the records so available are birth, marriage, and death records, records relating to the ownership of real property, court records, and records relating to the establishment and ownership of various business entities. Since the documents are kept in various offices it is best, of course, to consult an Italian attorney if any such official information is needed.

Conclusion

While the legal systems of Italy and the United States are completely different, provisions of Italian law and informal procedures which are accepted by the Italian government makes it possible to serve process and to obtain information which will be usable in an American action. The methods of serving process and obtaining the information may be a little complicated, but proper use of the Italian system should provide satisfactory results.